IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PENNY KIMBALL, and WADE KIMBALL,	)	C.A. No. 05C-06-052 (JTV)
Plaintiffs,	)	
v.	)	
PENN MUTUAL INSURANCE COMPANY, and HARLEYSVILLE MUTUAL INSURANCE COMPANY, a successor in interest Penn Mutual Insurance Company,	)	
Defendant, Third-Party Plaintiff,	)	
v.	)	
ENTERPRISE LEASING COMPANY OF NORFOLK-RICHMOND, a Delaware corporation,	)	
Third-Party Defendant.	)	

Submitted: September 8, 2006
Decided: January 31, 2007

E. Martin Knepper, Esq., Knepper & Stratton, Wilmington, Delaware. Attorney for Plaintiff.

Thomas P. Leff, Esq., Casarino, Christman & Shalk, Wilmington, Delaware. Attorney for Third-Party Plaintiff.

Jennifer R. Hurvitz, Esq., White & Williams, Wilmington, Delaware. Attorney for

Kimball et al. v. Penn Mutual Insurance Company, et al.
C.A. No. 05C-06-042 (JTV)
January 30, 2007

Third-Party Defendant.

Upon Consideration of Third-Party Plaintiff's
Motion for Declaratory Judgment against Third-Party defendant
GRANTED in Part
DENIED in Part

VAUGHN, President Judge

OPINION

The plaintiffs, Wade and Penny Kimball ("the Kimballs"), filed a complaint against defendants Penn Mutual Insurance Company and Harleysville Mutual Insurance Company ("Harleysville"),[1] in which they seek uninsured motorist (hereinafter "UM") benefits. These benefits are sought in connection with an automobile accident in which Penny Kimball was injured. Harleysville filed a third party complaint for Declaratory Judgement and other relief against third-party defendant, Enterprise Leasing Company of Norfolk-Richmond ("Enterprise"). Harleysville has now filed a motion for summary judgment in which it seeks a declaratory judgment that Enterprise has a legal obligation to provide liability coverage for the personal injury claims asserted by the plaintiffs and that it, Harleysville, is entitled to contribution from Enterprise for any loss Harleysville sustains because of those claims. In its response, Enterprise asks the Court to rule that the plaintiffs' are entitled to uninsured motorist coverage from Harleysville. In

[1] Harleysville Mutual Insurance Company is a successor in interest to Penn Mutual Insurance Company.

the context of this litigation, the Court interprets Enterprise's request as a request that it find that Enterprise's vehicle was uninsured because it was being driven by an unapproved driver, as discussed hereinafter.

STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] The facts must be viewed in the light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[5]

FACTS

On June 22, 2002, Douglas Dorsey ("Mr. Dorsey") rented a 2002 GMC pick-up truck from Enterprise in Virginia Beach, Virginia. On June 24, 2002, Mr. Dorsey and a companion, Jenna Shirley ("Ms. Shirley"), got into the GMC pick-up and began what was to be a two hour drive to Chincoteague, Virgina. Shortly after setting out,

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[2] Superior Court Civil Rule 56(c).

[3] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.,* 652 A.2d 1084, 1087 (Del. Super. 1994).

[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5] *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967).

Mr. Dorsey asked Ms. Shirley to take over the driving because of a migraine headache he was allegedly suffering. She did. While Ms. Shirley was driving the pick-up truck, she did so negligently and collided with the Kimballs' automobile, causing injury to Ms. Kimball.[6]

The terms of the rental agreement between Mr. Dorsey and Enterprise provided that Mr. Dorsey was 'the only permissive driver' of the pick-up truck. Relying on Virginia law, Enterprise denied coverage to Ms. Shirley. The Kimballs then filed this suit against Harleysville, their insurance carrier, for coverage under the Delaware Uninsured Motorist statute.

Harleysville contends that Ms. Shirley is not 'an unpermissive driver' as alleged by Enterprise because Ms. Shirley's use of the automobile fits into a medical emergency exception recognized under Virginia case law.

Enterprise contends that Virginia law does not apply in this case. Its contention is that the issue as to the Enterprise vehicle's insured/uninsured status is a question controlled by Delaware law. In the alternate, if Virginia law applies to the interpretation of the rental agreement, it contends that Ms. Shirley's operation of the automobile does not fit within the medical emergency exception recognized under Virginia law.

DISCUSSION

I. Harleysville's subrogation right against Enterprise.

Enterprise claims that Harleysville waived its right to challenge the uninsured

[6] It is undisputed that Ms. Shirley's negligent driving was the sole cause of the collision.

status of the Enterprise vehicle because it unconditionally accepted the Kimballs' UM claim, without any reference to a reservation of rights. This claim is rejected.

"[Subrogation] is a substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to a debt or claim, and its rights or remedies."[7] "Insurance companies generally have the right to assert the claims of a party whom they compensate against any party whom the compensated party could have sued."[8] In *Sinex v. Wallis,* this Court held that '18 *Del. C.* § 3902(a)(4) creates a right of subrogation in an insurance carrier who has made payment to an insured under an uninsured motorist clause.'[9]

Harleysville's subrogation right against Enterprise arises from the fact that it is faced with the possibility of having to pay UM benefits to the Kimballs as a result of Enterprise's alleged wrongful denial of liability coverage to the tortfeasor, Ms. Shirley. Due to its subrogation right with regard to those potential payments, Harleysville has standing to challenge the validity of Enterprise's denial of liability coverage and seek contribution for UM benefits it may be required to pay on behalf of the Kimballs as a result thereof.

II. Statute of limitations for a UM subrogation action.

Enterprise further contends that the statute of limitations precludes

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[7] *Sinex v. Wallis*, 565 A.2d 1384, 1386 (Del. Super. 1988).

[8] *Id.*

[9] *Id.* at 1388; *Jenifer v. Home Ins. Co.*, 1985 Del. LEXIS 560 at *5.

Harleysville's subrogation claim. This contention is also rejected. The issue of when the statute of limitations accrues with regard to a subrogation claim by an insurer, under 18 *Del. C.* § 3902(4), may not have been previously addressed by this Court.

In subrogation actions by a PIP insurer against a tortfeasor's insurer, this Court has held that a cause of action for the PIP insurer's statutory right of subrogation against the tortfeasor's liability insurer, does not accrue until the PIP benefit is paid to or for its insured.[10] By analogy, I conclude that the subrogation rights of an insurer liable for UM benefits do not fully accrue until it has paid UM benefits to or for its insured; therefore, its Third-Party Complaint against Enterprise for contribution is not barred by the statute of limitations.[11]

III. Whether Delaware or Virginia law applies in determining whether Enterprise improperly denied insurance coverage to Ms. Shirley.

Harleysville asserts that Enterprise wrongfully denied liability coverage to Ms. Shirley. Harleysville's contention is that Ms. Shirley is not 'an unpermissive driver' because Ms. Shirley's use of the automobile fits within Virginia's medical emergency

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[10] *Harper v. State Farm Mut. Auto. Ins. Co.*, 703 A.2d 136, 141 (Del. 1997); *Prudential Prop. & Cas. Ins. Co. v. Melvin*, 2001 Del. Super. LEXIS 157 at *5-6; *Nationwide Gen. Ins. Co. v. Hertz Corp.*, 2006 Del. Super. LEXIS 370 at *3-4.

[11] If the statute of limitations for a UM insurer's subrogation claim began to run at the time the tortfeasor's insurer denied liability coverage, a delay by its insured to make a UM claim could severely prejudice the UM insurer's ability to seek contribution from a tortfeasor's insurer who wrongfully denied benefits. The UM insurer's right to seek contribution should not be prejudiced by its insured's delay in bringing suit against it. An insurer, liable to its insured for UM benefits, has not been harmed until the tortfeasor's insurer improperly denies liability coverage for the tortfeasor **and** as a result, the insurer has to make UM payments to its insured. At that time, a UM insurer's contribution claim against a tortfeasor's insurer accrues.

exception.

"It is well settled that a suit contesting the construction of an insurance policy is a contract action involving questions of law."[12] "An action to ascertain the scope of uninsured motorist benefits in a policy is an action in contract, not tort."[13] The relevant test for choice of law issues in a contract case is the 'most significant relationship' test as laid out in Restatement 2nd of Conflicts of Laws § 188(1971).[14]

The accident occurred in Virginia. The pick-up truck driven by Ms. Shirley was a Virginia registered vehicle, leased by Mr. Dorsey, a Virginia resident, from Enterprise of Norfolk-Richmond, a Virginia based rental company. The rental agreement was entered into in Virginia, for the purpose of obtaining a rental car for which Mr. Dorsey could drive from Virginia Beach, Virginia to Chincoteague, Virginia for work. Utilizing the 'most significant relationships test', it is evident that

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[12] Aetna *Casualty & Surety Co. v. Kenner,* 570 A.2d 1172, 1174 (Del. Super. 1990).

[13] *Reese v. Wheeler,* 2004 Del. Super. LEXIS 180 at *5, *citing Allstate Insurance Co. v. Spinelli* 443 A.2d 1286, 1287 (Del. 1981).

[14] *Id.; see also Travelers Indemnity Co. v. Lake*, 594 A.2d 38 (Del. 1991); Restatement (second) of Conflicts of Laws § 188(2) (1971):

In the absence of an effective choice of law by the parties, the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

2. (a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Virginia law should apply to determine the rights and duties between Enterprise and Ms. Shirley, the alleged 'unpermissive driver' of the Enterprise rental vehicle at the time of the collision.

IV. Whether Enterprise improperly denied liability insurance coverage to Ms. Shirley.

On June 22, 2002, Mr. Dorsey rented a pick-up truck in Virginia Beach, Virginia from Enterprise. He planned on driving the truck to Chincoteague, Virginia on June 24, 2002 for work purposes. In his deposition, Mr. Dorsey stated that he had a migraine headache the night of June 23, 2002 that continued through the next morning on June 24, 2002. The headache was severe enough that he pondered calling in sick to work before he began his trip. Despite his reservations, Mr. Dorsey decided to drive on the morning of June 24, 2002. Although he had hoped that his migraine would subside while en route to his destination, it did not. Early in the trip, Mr. Dorsey's condition allegedly worsened. He was unable to continue driving and asked his companion, Ms. Shirley, to drive.

The Virginia Motor Vehicle Code requires self-insurers, such as Enterprise, to provide permissive users of a rented vehicle with bodily injury liability insurance.[15] Va. Code § 46.2-368(C) provides that no self-insured owner is liable to pay any judgment arising out of the use or operation of a covered vehicle by a person who used or operated the vehicle without permission of the owner. However, utilizing the

[15] Va. Code §§ 46.2-108(D), 46.2-705; *USAA v. Hertz Corp.,* 578 S.E.2d 775, 777-779 (Va. 2003).

Virginia Omnibus Insurance Statute,[16] the Virginia Supreme Court in *State Farm Mut. Auto Ins. Co. v. GEICO Indemn. Co.,* carved out a medical emergency exception to Section 46.2-368.[17] The Virginia medical emergency exception applies when four criteria are met:

> (1) an unforeseen incapacity to the driver, (2) requiring a substitution of drivers, (3) that the driver acted as a reasonable person under the circumstances, (4) and the exception is permitted only while the emergency circumstances exist.[18]

Looking at the facts in the light most favorable to the non-moving party, Enterprise, there is clearly a question of fact as to the applicability of the emergency medical exception, if for no other reason than that Mr. Dorsey knew he had the migraine before he departed.

The present state of the record does not permit a ruling that the facts of this case do or do not, as a matter of law, fall within the medical emergency exception. Enterprise argues that the migraine was foreseeable and that the substituted driver did not have a driver's license. However, there is evidence in the record that Mr. Dorsey's testimony is that after he started driving, the migraine became worse. In addition, the

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[16] Va. Code § 38.2-2204.

[17] 402 S.E.2d 21, 24 (Va. 1991); *Nationwide Mut. Ins. Co. v. Welcome Corp.,* 2001 Va. Cir. LEXIS 388 at *4.

[18] *Nationwide Mut. Ins. Co.,* 2001 Va. Cir. LEXIS 388 at *4.

police report does not indicate that the substituted driver was charged with driving without a license. Under the driver's license number block in the police report, the investigating officer recorded what appears to be a social security number, but he also indicated a state, Virginia. Moreover, whether turning the wheel of a vehicle over to an adult who is unlicensed where the driver allegedly becomes disabled must, per se, render the emergency medical exception inapplicable as a matter of law has not, in the Court's view, been fully addressed by both Harleysville and Enterprise in their papers or in the presentation of the motion.

Accordingly, the Court makes no ruling as a matter of law on the applicability of the Virginia emergency medical exception to the facts of this case at this time. The Court takes this view without prejudice to either party to move for summary judgment on this point at a latter stage of the litigation after the record has been more fully developed.

Therefore, Harleysville's motion for summary judgment is ***granted in part and denied in part***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File